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SUPREME COURT, U.S.

No. 06-747 CAPITAL CASE

Supreme Court of the United States

JOHN GILLARD,

Petitioner

v.

BETTY MITCHELL, WARDEN,

Respondent

On Petition For Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(Capital Case)

I. Whether the *Sullivan* presumption applies to a case where one attorney represents the defendant and a witness implicated in the same shootings, and the trial court appoints separate counsel for the witness prior to the witness testifying near the conclusion of the trial?

II. Whether a trial court has a duty to inquire of the defendant on trial when the prosecution raises a conflict of interest?

III. Whether cumulative error is a cognizable claim in federal habeas corpus review?

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I. THE SULLIVAN PRESUMPTION APPLIES TO A "SUCCESSIVE REPRESENTATION" IN THE SAME MATTER.

The Warden's Brief in Opposition does not dispute that the Petition raises an important and recurring issue as to the scope of *Cuyler v. Sullivan*, 446 U.S. 335 (1980). The Warden does contend in a single clause that the "circuit courts are not in conflict," but never explains why. Brief in Opp., p. 10. Indeed, the Warden avoids altogether discussing the legal issue that has split the circuits: the application of *Sullivan* in "successive" representation cases. Instead, the Warden argues that, for two reasons, this case is a "poor vehicle" to resolve conflicting interpretations of the application of *Sullivan*.

First, the Warden argues that the Court need not address the issue because the Ohio Supreme Court "reasonably assumed that *Sullivan* applied" to the joint representation in this case. Brief in Opp., p. 10.[1] This might be a valid point were Petitioner appealing from the Ohio Supreme Court decision. Petitioner is not. At issue is the Sixth Circuit's reversal of the district court's grant of relief under *Sullivan*. The lynchpin of the Sixth Circuit's reversal is its holding that because "this case involves successive representation," (John's counsel ceased at least formally representing William at the point in the trial that William testified), Petitioner supposedly fails to demonstrate that his counsel labored under any conflict of interest. *Gillard v. Mitchell*, 445 F.3d 883 (6th Cir. 2006). According to the Sixth Circuit, "(S)imultaneous and successive representation differ

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[1] The Warden's statement that the Ohio Supreme Court acted "reasonably" is certainly noteworthy given that Petitioner contends that the principles of *Sullivan* apply to the circumstances of this case. *See* Petition, pp. 15-17. The Warden largely ignores this principal issue.

materially because in the latter, the attorney is no longer beh n to the client." *Gillard*, 445 F.3d at 891, Apx. 12a. As . orth in the Petition, both as to the Sixth Circuit's conclusion that no conflict can arise from a successive representation and as to its underlying reasoning, there is significant and direct disagreement between circuit court decisions. *See* Petition, pp. 11-13, 18.[2]

Second, still avoiding the legal issue presented, the Warden argues that the lawyer, Martinez, did not serve conflicting interests. In arguing the lack of any conflict, the Warden does not rest upon the Sixth Circuit's reasoning that Martinez owed no duty to his former client. Instead, the crux of the Warden's argument is that "pinning the murder on William" was not "a viable alternative defense because William's involvement would not have been inconsistent with Gillard's guilt." Brief in Opp., p. 12.

However, in making this argument, the Warden does not even acknowledge the critical undisputed evidence: the blood spatter on William's clothing consistent with the blood of at least two and potentially all three victims. [Traverse, Exhibit N-3, 5-03-85 BCI Report.] The State has never disputed that this blood evidence places William within twenty-four inches of the victims at the moment they were shot. This blood evidence provides unconflicted counsel with a powerful scientific argument that William, not John, shot the victims. Because the State's theory of the case was

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[2] In addition to the cases cited in the petition for writ of certiorari, *see also Stewart v. Wolfenbarger*, 468 F.3d 338, 351 (6th Cir. 2006)(citing *Gillard* for proposition that application of *Sullivan* to successive representation not clearly established) and *Belmontes v. Woodford*, 350 F.3d 861, 885 (9th Cir. 2003)(citing circumstances where actual conflict of interest may arise from a successive representation), *vacated on other grounds*, *Brown v. Belmontes*, 544 U.S. 945 (2005).

that John actually shot the victims, the blood evidence would have supported a compelling argument not only to lessen John's role in this death penalty case,[3] but to remove him from the scene of the crime altogether. Indeed, the most compelling reason to doubt the State's case that John shot the victims is the blood on William's clothing and the shell casing in his pocket.

Once the physical evidence is fairly considered, the actual conflict of interest is unavoidable. In finding an actual conflict of interest, the district court emphasized that "(W)hile the testimonial and eyewitness evidence implicated John Gillard as the killer, the physical evidence clearly pointed towards William. Unconflicted counsel would have attacked the dual nature of the evidence, emphasizing that no physical evidence linked John to the crimes." Memorandum Opinion and Order, Apx. p. 56a. In reversing the district court, the Sixth Circuit never even acknowledged the blood on William or the reasonable inferences that can be drawn from it. And while the Sixth Circuit's decision turns on the appointment of separate counsel for William near the end of the trial, that decision never acknowledged that both before and after the appointment of separate counsel Martinez tried to diminish the physical evidence implicating William, all to John's prejudice.

The Warden further contends that there was no conflict because this case involves brothers "with a powerful personal

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[3] The Warden's argument ignores the unique nature of a death penalty case. Any evidence that potentially lessens John's role by showing the greater role of another could spare his life even if it does not exonerate him altogether. Moreover, the State charged John as "the principal offender," which under Ohio law means the actual killer. *See e.g., Mitchell v. Esparza*, 540 U.S. 12, 18 (2003). Evidence such as the blood on William, which supports that someone other than John actually killed the victims, goes to acquit John of a capital specification.

incentive to pursue a common defense." Brief in Opp., p. 10. In support of this theme, the Warden claims that John and William "provided alibi defenses for the other." Brief in Opp., p. 1. This is not accurate. Neither William nor John provided the other with an alibi for the critical period when the shootings occurred. In fact, each testified that he last saw the other hours before the shootings. [Trial, Vol. XXII, pp. 314-15, Appendix p. 4164-65; Trial, Vol. XXV, p. 825, Appendix p. 4689]. Furthermore, the Warden does not acknowledge that after the state court of appeals first reversed John Gillard's conviction, William struck a deal to testify *against* John in the event of a retrial. [Conflict Hearing, pp. 23-24, Appendix pp. 5357-58.] This fact only emphasizes why one lawyer should never have represented both William and John.[4]

Moreover, while the Warden argues that this case should be treated differently because of the supposed interest of the two clients to present a common defense, a series of federal decisions disagree on similar facts. *See Hammon v. Ward*, 466 F.3d 919, 929-31 (10th Cir. 2006)(remanding for hearing into "actual conflict" under *Sullivan* where one attorney successively represented two brothers implicated in the same crime); *Griffin v. McVicar*, 84 F.3d 880, 886-91 (7th Cir. 1996)(actual conflict where defendant wanted to claim joint alibi with co-defendant but attorney – who also represented co-defendant – failed to offer and counsel best defense

[4] The Warden cites the testimony of Craig Chessler, second chair for John Gillard (and who joined the City Prosecutor's office during the month John Gillard's trial ended), that he was unaware whether or not Martinez formally represented William. Brief in Opp., p. 5. However, Chessler plainly had limited knowledge of what Martinez was doing. Moreover, Martinez himself made clear on the record that he continued to represent William after the preliminary hearing, including when the State sought blood samples from William. [Trial Vol. XXII, pp. 254, 258, Appendix pp. 4104, 4108.]

implicating co-defendant as shooter); *Sanders v. Ratelle*, 21 F.3d 1446, 1454-55 (9th Cir. 1994)(granting relief where attorney represented two brothers implicated in the same shooting and failed to implicate co-defendant's brother apparently out of sense of obligation to family); *cf. Avila v. Galaza*, 297 F.3d 911, 921-22 (9th Cir. 2002)(belief that defendant and his family did not want to implicate other brother in shooting "patently unreasonable" basis to fail to investigate and introduce evidence of brother's guilt). Indeed, this argument does not appear in the Sixth Circuit's decision. Nor does the State cite any authority from this Court or any other indicating that the existence of an actual conflict of interest is governed by the alleged subjective intentions of the client as opposed to the objective circumstances documented in the record.

Finally, in trying to develop minor and unexplained factual distinctions between this and other cases, the Warden ignores the governing principles set forth in this Court's decisions going back to *Glasser v. United States*, 315 U.S. 60 (1942), *Sullivan*, 446 U.S. 335, and *Wood v. Georgia*, 450 U.S. 261 (1981). Through those decisions, this Court demonstrated the manifest concern that an attorney's joint representation not result in a breach of the duty of loyalty, perhaps an attorney's most fundamental duty. *See e.g.*, *Strickland v. Washington*, 466 U.S. 668, 692-93 (1984). A number of circuit courts, both before and after this Court's decision in *Mickens v. Taylor*, 535 U.S. 162 (2002), have found "the evil" of divided loyalties present in a successive representation, at least where, as here, the representations occur in the same or closely linked cases. *See* Petition, pp. 11-13. Despite the clear instances in this record of choices made helpful to William and harmful to John, the Sixth Circuit held there could be no actual conflict of interest because the representation was "successive." This presents a

clear conflict in the circuits, and this is a highly appropriate case to resolve it.

II. ONCE THE PROSECUTION RAISED THE CONFLICT OF INTEREST, THE TRIAL COURT HAD A DUTY TO RESOLVE IT AS TO THE DEFENDANT.

As to the failure to inquire issue, the Warden again does not dispute that this case raises important issues of law meriting the attention of this Supreme Court. In fact, the Warden does not address at all the issue as to whether a prosecutor's objection obligates the trial court to inquire into the conflict of interest.[5] Instead, the Warden again sidesteps the legal issue for a discussion of the facts, this time to show that the trial court did address the conflict. This argument misses the point.

As the Ohio Supreme Court found when first remanding the case, "the trial court did *not* address appellant with respect to any possible conflict of interest and did *not* inquire into whether Martinez' representation of William affected, or would affect, Martinez' representation of *appellant*." *State v. Gillard*, 64 Ohio St. 3d 304, 308 (1992), Apx. p. 200a (emphasis in the original). The issue is thus whether, after expressly recognizing the conflict of interest as to both William and John, the trial court had a duty to inquire directly as to John.

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[5] The Warden does suggest that we should accept Martinez's muted protest "I do not feel that there is a question of a conflict" over the Prosecutor's statement "I think that we clearly have a conflict of interest here." [Trial Vol. XXII, pp. 253-54, Appendix pp. 4103-04.]

The Sixth Circuit answered the question in the negative, arguing that the trial court "did all that was required of it."[6] *Gillard v. Mitchell*, 445 F.3d at 892, Apx. p. 14a. The Sixth Circuit so holds although the trial court never spoke directly to John (as opposed to his counsel or William), nor appointed new counsel for John. In contrast, decisions from at least two other circuits require that once aware of the conflict, the trial court must obviate the risk by substituting conflict-free counsel for the defendant or allowing the defendant to waive the conflict. *See* Petition, p. 22. The Warden tries to distinguish the facts of those cases, but what the Warden does not attempt to show is that the Second Circuit's and the Tenth Circuit's interpretation of the duty to inquire is consistent with the Sixth Circuit's decision in this case. Nor does the Warden address the contradictions between *Mickens'* language and this Court's prior decisions. *See* Petition, pp. 16-18, 20-21.

In sum, this case presents significant Sixth Amendment issues that have received conflicting resolution from the circuit courts. This Court's dicta in *Mickens v. Taylor*, 535 U.S. 162 (2002), has not resolved the inconsistent applications of *Sullivan* and the other decisions making up this Sixth Amendment conflict of interest framework. To the contrary, federal courts of appeals now disagree as to the extent *Mickens* bears on the application of *Sullivan*. *See* Petition, p. 18. For the reasons stated, this case presents an ideal circumstance to resolve conflicting interpretations of the scope of application of *Sullivan*, and resolve the disagreement as to the obligations of a trial court to resolve a known potential conflict of interest.

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[6] In remanding the case, the Ohio Supreme Court expressly did not "accept the limited inquiry conducted by the trial court" and found in addition that appointing separate counsel for William did not correct the problem as to John. *State v. Gillard*, 64 Ohio St. 3d at 312, Apx. 206a.

III. WHERE CUMULATIVE ERROR DEPRIVES A DEFENDANT OF A FUNDAMENTALLY FAIR TRIAL, FEDERAL HABEAS SHOULD PROVIDE A BASIS FOR RELIEF.

The Warden contends that the Sixth Circuit's decision reversing on the cumulative error claim "does not conflict with Court precedent or the other Circuits." Brief in Opp., p. 21. In making this argument, the Warden recasts the Sixth Circuit's holding to bar the cumulation of nonconstitutional errors into a constitutional violation. The Sixth Circuit's holding is more restrictive than that. In barring cumulative error claims, the Sixth Circuit states that the "Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief." *Gillard*, 445 F.3d at 898 (quoting *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002)). This holding plainly conflicts with decisions of at least three other circuits recognizing that the cumulative effect of two or more harmless errors may justify relief. *See* Petition, p. 24; *Alvarez v. Boyd*, 225 F.3d 820, 824 n.1 (7th Cir. 2000)(noting conflict between its holding and Eighth Circuit's decision that the cumulative effect of trial errors does not provide a basis for relief in a §2254 petition). In sum, in certain circuits harmless errors may be considered as to their cumulative effect; in others, they may not. This is a basic conflict.

The Warden also argues that the Sixth Circuit considered the cumulative impact of error in this case. It is correct that after stating the Sixth Circuit's rule that such a cumulative error claim does not provide a basis for habeas relief, the Sixth Circuit's decision included six words stating that the "cumulative effect thereof is likewise insufficient." Such an alternative holding should not foreclose review of what was plainly the principal basis to reverse the district court. *Cf.*

Harris v. Reed, 489 U.S. 255, 264 and n. 10 (1989)(reaching the merits in an alternative holding will not waive the imposition of a procedural bar). Regardless of the alternative holding, all judges in the Sixth Circuit are bound to follow the court's holding that cumulative error does not provide a basis for habeas relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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